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ABSTRACT

The author demonstrates why he thinks the Supreme Court has misinterpreted the First Amendment of the U.S. Constitution. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." The author claims that the Supreme Court, based on flawed reading of the intentions of the authors of the First Amendment, has held since 1947 that the establishment clause requires both Congress and the states to maintain strict neutrality between religion and irreligion in any laws that might conceivably aid private religious organizations. Based on a study of historical documents of the debates in the First Congress, the author believes that aid to religion was to be permitted as long as it furthered a purpose the federal government could legitimately pursue and as long as it did not discriminate in favor of some sects or against others. In the first part of the monograph the author reviews historical documentation of debates in the Supreme Court and the Senate concerning the establishment clause. In the second part he analyzes the intended meaning of the Amendment's clause about free exercise of religion. Among his sources for interpreting political philosophy are the 1776 Virginia Declaration of Rights, and writings of James Madison, Thomas Jefferson, and John Locke. (Author/AV)

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RELIGION AND POLITICS

The Intentions of the Authors of the First Amendment

Michael J. Malbin

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PREFACE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

What precisely do these sixteen words from the First Amendment to the U.S. Constitution prevent Congress from doing? The Supreme Court has held since 1947 that the establishment clause requires both Congress and the states to maintain strict neutrality between religion and irreligion in any laws that might conceivably aid private religious organizations. Legal disputes since then have had to do with the differences between "aid" to religion (prohibited by the Court), neutrality (required), and hostility (supposedly prohibited). Free exercise legal doctrine, in contrast, has been anything but neutral. The Supreme Court has said since 1961 that people with religious objections to valid secular statutes may, under certain circumstances, have a right to be exempted from the statute's requirements.

As the Court has espoused its doctrines, it has relied on an incredibly flawed reading of the intentions of the authors of the First Amendment. Unfortunately, most scholarly writings on the subject are little better.[1] Some are good on isolated points, but rarely has one tried

[1]There is one noteworthy exception: Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976), pp. 1-32. Berns's conclusions and mine are similar, although the evidence we use is different. This monograph is based on a Ph.D. dissertation Berns supervised: M. Malbin, *The Supreme Court and the Definition of Religion* (Cornell University, 1973). I should like here to express my thanks to him for his help and advice. Thanks also to Ann Diamond for her helpful comments.

The late Herbert J. Storing also read an early version of this work and made what for him were his normal quota of penetrating, insightful observations. I took Professor Storing's course on the American Founding at the University of Chicago in 1964. It was my first course in graduate school, but I can honestly say that none after that influenced my understanding of U.S. politics as deeply. I was one student in a fairly large class, and I transferred schools before reaching the dissertation stage. Yet, Professor Storing always managed to find the time to read my manuscripts or answer my questions, as he did with scores of others across the country.

to explain the complexities of the establishment issue or the relationship between establishment and free exercise.[2]

This monograph attempts to correct that deficiency. It argues that the debates in the First Congress suggest that Congress did not mean the establishment clause to require strict neutrality between religion and irreligion. Aid to religion was to be permitted as long as it furthered a purpose the federal government legitimately could pursue and as long as it did not discriminate in favor of some sects or against others.

Federal aid to private schools would thus have been allowed under the original meaning of the establishment clause. Indeed, aid could even have been limited to religious schools, if Congress had a valid secular reason for doing so and if it could somehow manage to define "religion" in a way that did not exclude minor religions. However, these obstacles to limiting aid to religious schools would be substantial, perhaps insurmountable, in our modern, pluralistic nation, with its vast multiplicity of sects. The original purposes of the establishment clause applied today might well require government aid to include some or all secular schools, as well as the religious schools. Similarly, the original rule of law, applied today, would probably be inconsistent with such traditional practices as school prayers. Thus, a fully enforced requirement of nondiscrimination might not change many of the Supreme Court's specific holdings of recent decades. A return to the original conception, however, would surely alter the basic view of the relationship between religion and government in a way that would affect future legislation and future court cases.

A return to the original understanding of free exercise would work a similarly fundamental change in the way judges view court cases without compelling a reversal of many recent holdings. While there is less direct documentary evidence on free exercise than on establishment, the framers unquestionably denied that anyone had a *right* to claim an exemption from a valid, secularly based law because of a

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[2]The two works which best seem to recognize the complexities of the historical establishment clause are Mark DeWolfe Howe, *The Garden and the Wilderness* (Chicago: University of Chicago Press, 1965) and David Lowenthal, "The Place of Religion in American Public Life: A Critique of Absolute Separationism" (Unpublished, 1969). The best known attempt to treat the two clauses as a unit is Phillip Kurland, *Religion and the Law* (Chicago: Aldine Publishing Co., 1962), which does not claim to be an interpretation of the work of the First Congress. Neither do the articles that deal with both clauses, such as Marc Galanter, "Religious Freedoms in the United States—A Turning Point?" 1966 *Wisc L Rev* 217; Donald A. Gianella's two-part "Religious Liberty, Nonestablishment and Doctrinal Development," 80 *Harvard L Rev* 1381 (1967) and 81 *Harvard L Rev* 513 (1968); and Paul G. Kauper, "*Schempp* and *Sherbert*: Studies in Neutrality and Accommodation," 1963, *Religion and the Public Order* 3.

religious objection to it. Legislatures were encouraged to grant exemptions, but they were not required to do so. Precisely what was meant when the people were granted the right to exercise their religion freely needs detailed exploration. It is clear, however, that it did not mean what modern judges claim.

1

The Establishment Clause

A great deal has been written about the original meaning of the establishment of religion clause, much more than has been written about free exercise. But for all of this writing, nobody has tried to interpret the debates in the First Congress on a speech-by-speech basis.

One reason for this reluctance to look into the legislative history has to do with the sources available to the scholar. It always has been known that the *Annals of Congress*, by far the most complete records of the debate available, is taken from the shorthand notes of a reporter, Thomas Lloyd, who compiled them for private sale. Because there were no verbatim or official notes of those early congressional debates, most historians have been reluctant to lean too heavily on them for their interpretations.

Recent archival work has made it possible for the student of the religion clauses to use the *Annals* with much greater confidence than might have been felt in the past. The First Congress Project at George Washington University, sponsored by the National Archives, has been collecting a massive amount of material in preparation for what it expects to be the definitive multivolume documentary history of the First Congress.[1] While the same cannot be said for all of the clauses in the Bill of Rights, nothing collected by the First Congress Project suggests any reason for dissatisfaction with the *Annals* on the religion clauses. Lloyd may not have recorded every word of every speech, but at no point do the other accounts of the debates add new information to the *Annals* or alter what was in them.

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[1]The project director is Professor Linda Grant DePauw. The first of a projected seventeen volumes was: *Documentary History of the First Federal Congress of the United States of America, Vol. 1: Senate Legislative Journal* (Baltimore and London: Johns Hopkins University Press, 1972). I should like to thank the project's two assistant editors, Charlene B. Bickford and Lavonne M. Hoffman, for their assistance.

Lloyd's notes tell us that the members of the First Congress did not intend the establishment clause to mean anything remotely resembling what the Supreme Court has been saying it means, at least since 1947. Some of the justices in recent years appear to have recognized that the Court's rulings have not been based on a proper reading of 1789 history.[2] But the justices have not replaced the earlier misreadings of history with an alternative interpretation. Instead, they have been acting almost as if their recognition of their predecessors' historical errors have liberated them from the need to consider what purposes the members of the First Congress may have meant the religion clauses to serve.

The turning point in the recent history of the establishment clause was the 1947 parochial school busing case of *Everson* v. *Board of Education*.[3] In the opinion written for the Court by Hugo Black, the Court announced a rule of law, endorsed by dissenters as well as by the five-justice majority:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[4]

There were two key elements in this rule. (1) The Court said that Congress cannot give nondiscriminatory aid to religion. There never was any question that the clause prohibited Congress from preferring one religion or group of religions over another, but this was the first time the Supreme Court took the additional step of prohibiting nonpreferential aid to religion as such. (2) The other key element in the *Everson* rule was its effect on the states. For the first time, the Court said that whatever Congress could not do, the states could not do either.

The *Everson* Court claimed that it based its reading of the establishment clause on the intentions of the people in the First Congress.[5] Later, the Court led by Chief Justice Earl Warren reiterated this historical assertion in opinions endorsing the *Everson* rule.[6] While a number

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[2]See, for example, Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L.ed.2d 697 (1970), where Chief Justice Burger refers favorably to C. J. Antieau, A. T. Downey, and E. G. Roberts, *Freedom from Federal Establishment: Formation and History of the First Amendment Religion Clauses* (Milwaukee: Bruce, 1964), p. 5, note 9, without adopting their affirmative thesis.

[3]330 U.S. 1, 67 S. Ct. 504, 91 L.ed. 711 (1947).

[4]330 U.S. 1, 15.

[5]330 U.S. 1, 13.

[6]McGowan v. Maryland, 366 U.S. 420, 440-41, 81 S. Ct. 1101, 6 L.ed.2d 393 (1961); Engel v. Vitale, 370 U.S. 421, 425, 82 S. Ct. 1261, 8 L.ed.2d 601 (1962); Abington School District v. Schempp, 374 U.S. 203, 213-14, 83 S. Ct. 1560, 10 L.ed.2d 844 (1963).

of legal scholars have supported *Everson's* reading of history,[7] the reading has not gone unchallenged. An impressive number of scholars has written in opposition to either the no-aid rule[8] or the extension of the establishment clause to the states,[9] but none has tried to interpret Lloyd's notes on a speech-by-speech basis. When we look at these notes carefully, we find that not one, but both, halves of the *Everson* rule fly in the face of the intended meaning of the establishment clause.

Amendments Proposed

The Constitution, as ratified, mentioned religion only once—in the Article VI clause prohibiting religious tests for national office. The delegates at the Philadelphia Convention thought that, since they were creating a government of limited powers, with no authority to act in matters relating to religion, no further protection was necessary. An extended, commercial republic, made up of people of all faiths, would never let the government impose a religious orthodoxy, as long as all kinds of people could be represented in the legislature.

This argument was not enough to satisfy many of those attending state ratifying conventions. Many of them were concerned that the federal government, using its constitutionally delegated powers, might pass laws indirectly affecting religion or other subjects previously reserved for the states. As a result, many of these ratifying conventions urged the national government to amend the Constitution as soon after ratification as possible. A few states specifically urged the inclusion of a bill of rights. Virginia and North Carolina proposed identical provisions dealing with religion:

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[7]Robert G. Dixon, "Religion, Schools and the Open Society," 13 *Journal of Public Law* 267, 278 (1964); Leonard Levy, *Judgments: Essays on American Constitutional History* (New York: Quadrangle, 1972) and "School Prayers and the Founding Fathers," *Commentary*, vol. 34 (September 1962), p. 225; Leo Pfeffer, "The Case for Separation," in J. Cogley, ed., *Religion in America: Original Essays on Religion in a Free Society* (New York: Meridian, 1968), pp. 57-73.

[8]Antieau, Downey, and Roberts, *Freedom from Federal Establishment;* Edward S. Corwin, "The Supreme Court as a National School Board," 14 *Law and Contemporary Problems* 3 (1949); Lowenthal, "The Place of Religion in American Public Life: A Critique of Absolute Separatism" (Unpublished, 1969); Edward R. Norman, *The Conscience of State in North America* (London: Cambridge University Press, 1964); James M. O'Neill, *Religion and Education Under the Constitution* (New York: Harper, 1949); Charles E. Rice, *The Supreme Court and Public Prayer* (New York: Fordham, 1964).

[9]Mark DeWolfe Howe, *The Garden and the Wilderness* (Chicago: University of Chicago Press, 1965), pp. 22-23; Wilbur Katz, *Religion and the American Constitutions* (Evanston, Ill.: Northwestern University Press, 1964) and "The Case for Religious Liberty," in Cogley, ed., *Religion in America*, p. 101; Lowenthal, "The Place of Religion," p. 19; O'Neill, *Religion and Education*, p. 10; Joseph Snee, "Religious Disestablishment and the Fourteenth Amendment," 1954 *Washington University Law Quarterly* 371.

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.[10]

New York offered a provision similar to these,[11] while New Hampshire suggested that "Congress shall make no laws touching religion or to infringe the rights of conscience."[12]

When James Madison reworked the many amendments suggested by the states into one set of proposals to be presented to the First Congress, he revised this religion amendment and added a new one not suggested by the states that would have limited state power. The two amendments were introduced by Madison to Congress on June 7, 1789.

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.[13]

> No state shall violate the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases.[14]

The language used in these amendments indicates that Madison wanted to prohibit both the states and the federal government from infringing on the rights of conscience. In contrast, the establishment clause was to apply only to the federal government.

Madison's proposed amendments were referred on June 7 to the Committee of the Whole House.[15] After they sat idle for a month and a half, they were referred on July 21 to a specially formed Select Committee, of which Madison was a member.[16]

The Select Committee acted fairly quickly, reporting to the House after one week, on July 28. The committee recommended the proposal to prohibit the states from violating the equal rights of conscience, and

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[10]J. Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d ed., 5 vols. (Washington, D.C., 1836), vol. 3, p. 659 (Virginia) and vol. 4, p. 1244 (North Carolina).

[11]Ibid , vol. 1, p. 328.

[12]Ibid., vol. 1, p. 362.

[13]1 *Annals of Congress* 434 (June 8, 1789).

[14]Ibid., p. 435.

[15]Ibid., p. 450.

[16]Ibid., p. 665.

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the House passed it after little debate and only a minor modification.[17] It also recommended an amended version of the proposal limiting congressional action, but, in contrast with the limitation on state action, this proposal was debated by the First Congress at greater length than almost any other item in the Bill of Rights.

The committee version of the limitation on congressional action, which was to be changed several times during the course of the debates over the Bill of Rights, read:

> No religion shall be established by law, nor shall the equal rights of conscience be infringed.[18]

This committee version made two major changes from the original Madison proposal. First, the committee dropped the phrase "the Civil Rights of none shall be abridged on account of religious belief or worship." Since there was no committee report, any explanation of the meaning of this change must be conjectural. One plausible reason for the omission is that the phrase seems to be redundant, protecting nothing not covered either by Article VI of the original Constitution or by the other clauses of the proposed amendment.

The second committee change was the omission of the word "national" used in Madison's proposal, making the amendment read, "No religion shall be established by law." This change was more significant than the other one, but it would be best to defer an explanation of its meaning until the debate is analyzed.

Another two weeks passed between the July 28 filing of the Special Committee's report and the consideration of the Bill of Rights on the floor. In other words, more than two months elapsed between Madison's June 7 introduction of the amendments and the start of floor debate on August 15.

This waiting period may seem normal to a student of the modern Congress, who is used to seeing bills become lost in standing committees. But it was exceptional in the early Congresses, and, as the months wore on, the time element became an important factor in the political strategies of those interested in the amendments.

Anti-Federalists who had opposed the Constitution had used the lack of a bill of rights as an argument against ratification. Now, these same anti-Federalists hoped to stall the Bill of Rights and thus weaken support for the new Constitution. The tactic might have succeeded. There was a delay in assembling a quorum at the beginning of the First Congress and time was short.

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[17] The House's rewording involved only a minor shift in grammar. 1 *Annals* 755.

[18] 1 *Annals* 729.

Madison understood this tactic for what it was.[19] Once the amendments reached the floor, he acted forcefully to expedite debate and to arrange the compromises necessary to assure passage before adjournment.[20] Readers looking at the *Annals of Congress* for the first time have to bear this in mind as they read the Bill of Rights debate. Much of the character of the debate, as well as some specific features of the compromises made, derive directly from the tactical situation created by this time pressure.

The August 15 Debate

Debate on the Bill of Rights opened in the House on August 15, when the religion amendment received its principal consideration. The debate left many questions unanswered—one day was hardly sufficient for a matter as complex as religious disestablishment and toleration. But one day was more than the Congress spent on most other items in the Bill of Rights. After the pressure of time had become more obvious, the members accepted some of the clauses, including the free exercise clause, with little or no debate.

The August 15 speeches concentrated on the establishment question, bypassing the "rights of conscience" or "free exercise" clause almost completely.[21] Peter Sylvester, a fifty-year-old lawyer from New York who served on the Committee of Safety in 1774, opened the debate.

Sylvester's speech indicated that he was unhappy with the language in the Select Committee's version of the establishment clause. His objection, he said, was that the particular words used could lend themselves to an unintended construction. In particular, he feared that

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[19]James Madison, *The Writings of James Madison*, Gaillard Hunt, ed., 9 vols. (New York: Putnam, 1900-1910), vol. 5, p. 335.

[20]See, for example, Madison to Edmund Randolph, August 21, 1789, ibid., vol. 5, pp. 417-18. A similar point about the delaying tactics of the opposition was made in a letter from John Brown to William Irvine, August 17, 1789. The letter is held in the Caryl Roberts Collection of the Irvine Papers, Historical Society of Pennsylvania. Brown wrote, "the Antis, viz, Gerry, Tucker, etc., appear determined to obstruct and embarass the business as much as possible." A similar picture of Gerry and Tucker's motives appears in a letter dated August 18, 1789, from Frederick A. Muehlenberg to Benjamin A. Rush. Copies of both letters are available in the files of the First Congress Project.

[21]The entire debate may be found at 1 *Annals* 729-31, and is reproduced in Stokes, *Church and State*, vol. 1, pp. 541-43. Unfortunately, there seems to be some variation in the pagination of different prints of the *Annals*. In a footnote, Stokes refers to this debate as occurring on pp. 757-59, and this author has seen other numberings as well. The numbers given here seem to be the most common. Any researcher having trouble using the *Annals*, however, would be best advised to rely on dates rather than page numbers.

the clause "might be thought to have a tendency to abolish religion altogether."[22]

Sylvester's objection seems a strange one. Readers trying to make sense of the debates have to ask themselves how anyone ever could think that an amendment reading "no religion shall be established by law" could be dangerous for religion. Unfortunately, Sylvester never explained his reasons.

What seems likely is that Sylvester had two premises in mind as he spoke: (1) He probably was concerned that the phrase "no religion should be established by law" could be read as a prohibition of all direct or indirect governmental assistance to religion, including land grants to church schools, such as those contained in the Northwest Ordinance, or religious tax exemptions. (2) Sylvester apparently thought some form of governmental assistance to religion was essential to religion's survival. Unless these premises are assumed, it is difficult to see how Sylvester could have seen the establishment clause as a threat to religion.

This reading of Sylvester's statement obviously supports this author's view of the historical meaning of the establishment clause. But as convenient as it is, it involves too many assumptions to be accepted without corroboration. It is necessary, therefore, to continue reading beyond the debate's first speech.

As we continue reading, however, we discover rapidly that something said by the Massachusetts anti-Federalist leader Elbridge Gerry supports this interpretation of Sylvester's remarks. Gerry spoke after Select Committee Chairman John Vining, of Delaware, who would have reversed the order of the "rights of conscience" and "establishment" clauses as a way of showing concern for the continued existence of religion. Gerry urged the Congress to reword the amendment to read "no religious doctrine shall be established by law."[23] The effect of this would have been to prohibit the most serious form of religious establishment, the proclamation of an official credo, without prohibiting all things that might conceivably be regarded as "aids" to religion.

What did Gerry's proposal have to do with the two speeches preceding his? Gerry apparently was responding to something, rather than starting the debate anew. Gerry may have been dissatisfied with Vining's response to Sylvester's criticism of the clause. Since Gerry's alternative language would have allowed some assistance to religion, that seems to confirm our earlier reading of Sylvester.

Roger Sherman, of Connecticut, was the fourth speaker whose

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[22] 1 *Annals* 729.

[23] Ibid., p. 730.

remarks were recorded by Lloyd. Sherman reiterated the Federalist delegated-powers argument against having any bill of rights. Sherman said that he saw no need for an amendment, since the government had no authority to pass legislation dealing with religion. Daniel Carroll, the fifth speaker, disagreed with Sherman, not because of his understanding of the powers delegated to the federal government, but because of the need for conciliating the anti-Federalists, who wanted amendments to quiet their fears about the new government's powers.

The next speaker was James Madison. Lloyd's summary of his speech reads:

> Mr. MADISON said, he apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish *a* national religion.[24]

Madison's response to Sherman in this speech is obvious and on the surface: whether the amendment really was needed or not—he privately agreed that it was not—some states wanted it. But there is another interesting aspect of this speech. In two places Madison misquoted his own proposal, adding a word to it by saying that Congress should not establish *a* religion. The additional word is significant. If it had been in the original, Sylvester would never have objected. If the added word had been in Madison's clause, it could not have been read as a prohibition of indirect, nondiscriminatory assistance to religion. To say that Congress should not establish *a* religion differs from saying it should not assist religion as such.

Benjamin Huntington, speaking after Madison, returned to this problem of the difference between the clause's language and the intentions of the members of Congress. Huntington said that he agreed with Madison about what people wanted the amendment to say. In a phrase similar to Sylvester's, however, he expressed concern "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion," and he "hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of

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[24]Ibid. [Emphasis added.]

the rights of religion, but not to patronize those who professed no religion at all."[25] That is to say, Huntington thought the amendment should not require the government to be neutral to all differences between religion and irreligion.

Madison responded by suggesting that if the word "national" were added before the word "religion"—which would return the clause to the language he presented on June 28—the questions raised by both Sylvester and Huntington would be answered. He then indicated clearly that he accepted the Sylvester-Huntington view of what the clause should be saying, by stating its most important purpose in this way:

> Madison believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.[26]

Up to this point in the debate, everyone seemed agreed on what they wanted the amendment to say. The major disagreement was over the language reported by the committee, and whether it could be misconstrued to mean something other than what was intended. All of the speakers, except Sherman, agreed that the Bill of Rights should prohibit the new government from establishing a national religion. In addition, they did not want the government to have the power deliberately to favor one religion over another. But every one of them also seemed to agree that the Bill of Rights should not prevent the federal government from giving nondiscriminatory assistance to religion, as long as the assistance is incidental to the performance of a power delegated to the government. Both Sylvester and Huntington thought that the failure to extend this kind of assistance would be the equivalent of active hostility to religion. Madison, even though he privately questioned the efficacy of governmental assistance to religion, accepted the Sylvester-Huntington view throughout the First Congress debates.

A new element was added to the debate immediately after Madison's speech urging the addition of the word "national." Samuel Livermore, of New Hampshire, objected to the rewording and offered in its place the language proposed by the New Hampshire ratifying convention: "Congress shall make no laws *touching* religion, or infringing the rights of conscience."[27] This was the first statement in the debates

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[25]Ibid., 730-31.

[26]Ibid., p. 731.

[27]Ibid. [Emphasis added.]

which, if taken out of context, could conceivably be used to support the modern Supreme Court's "no aid to religion" interpretation of the establishment clause. But Livermore's silence on the agreement between Sylvester, Huntington, and Madison on indirect nondiscriminatory assistance suggests that what he wanted had little to do with the aid/no aid issue. This is confirmed by the character of the arguments used by Elbridge Gerry to support Livermore.

Gerry, speaking next, immediately connected Livermore's proposed language to Madison's use of the word "national." Gerry objected to Madison's choice of language because it implied that the Constitution created one nation, with a national government, instead of a union of states ruled by a federal government with limited powers. He principally was concerned, in other words, with the symbolic importance of putting the word "national" in our fundamental legal document, a word which the 1787 Convention carefully left out of the original Constitution when referring to the government of the United States. Gerry's concern with the relationship between the federal and state governments, expressed here during the establishment clause debate, was a consistent theme raised by Gerry during the First Congress, as it had been during the Constitutional Convention.

The Select Committee's version of the establishment clause—with its deletion of the word "national" from Madison's original proposal—would have satisfied this objection of Gerry's, but the committee version was too ambiguous on other grounds. Gerry supported Livermore because Livermore went even further than the committee did toward satisfying Gerry's concern over the nation/state issue. Livermore's suggested prohibition of any federal law "touching" religion differed in two ways from the versions of the clause discussed until then. (1) Livermore's language apparently would have prohibited any form of federal aid to religion, including nondiscriminatory aid offered to achieve a properly delegated end. However, this would not have led to the destruction of religion that Sylvester and Huntington feared, because Livermore's language reaffirmed the power of the states to aid religion as they saw fit. (2) Indeed, state power would have been enhanced. The Federalist interpretation of "necessary and proper" was consistent with permitting federal laws to affect state establishments indirectly, as long as Congress was trying to achieve something it had the power to accomplish. Livermore would have prevented this, and thereby could have raised havoc with the powers of the new federal government. It was precisely for this reason that Gerry, ever watchful of the new government's power, supported Livermore.

Livermore and Gerry had struck a responsive chord, and Madison

knew it. He spoke right after Gerry to deny that his insertion of the word "national" was meant to have any symbolic importance, and he withdrew his motion to include the word. But the damage to the Federalist position had been done, at least for that day. The Select Committee's language, which had been neutral on the nation/state issue, was defeated 31-20 by the anti-Federalist Livermore proposal.

The August 20 Reconsideration

The August 15 debate was the only one recorded on either of the religion clauses. But the conclusion of public debate did not put an end to the changes the members of the First Congress made in the wording of the amendment.

On August 20, Fisher Ames, of Massachusetts, suggested that the establishment clause should be returned to the Select Committee's version. His proposal also marked the first congressional appearance of the free exercise clause as we know it.

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.[28]

If the interpretation given here of the Livermore amendment is correct, the Ames version of the establishment clause represented a return to a compromise position on the nation/state issue: while there were no claims that the United States was one "nation," neither were there any positive assurances that Congress would not do anything that touched the state religious establishments. This compromise, however, was not to be the last word on the nation/state issue.

Ames's addition of the free exercise clause obviously was important, but because the *Annals* do not report any speeches on the proposal, it is difficult to determine its meaning. What was the relationship between the "free exercise" and the "rights of conscience" clauses in Ames's proposal? Were they redundant? Was the phrase "free *exercise*" meant to suggest that something more than rights of conscience or belief were to be protected? If so, what did the word "exercise" mean? Since Madison did use the word "worship" in his first version of the religion clauses, did "exercise" refer to the utterance and expression of belief through worship? If so, was the idea of worship understood to be limited to traditional modes of public, congregational prayer, or were other forms of expressive activity and/or religiously motivated behavior to be protected as well? Without any legislative record it

[28] 1 *Annals* 766 (August 20, 1789).

impossible to answer these questions without referring to noncongressional contemporary sources. We shall turn to these later.

Although there was no floor debate on Ames's motion, there must have been considerable discussion of it off stage before it was introduced. The House accepted the motion of August 21, with no apparent controversy or counterproposal. On August 24, after some minor stylistic revision, the House sent the Ames's version to the Senate as its final version of the religion amendment.[29]

Senate Action

The principal Senate debate on the amendment apparently took place on September 3. We have to say "apparently" because Senate floor debates during the early Congresses were kept secret.

The Ames amendment must have provoked controversy in the Senate, since several alternative versions were suggested in its place. The votes on these seem to have been close, because competing versions were passed and then defeated again in fairly rapid order. Unfortunately, the *Senate Journal* does not even give us vote divisions; all we are told is whether a given motion passed or was defeated.

The first substitute amendment to be offered in the Senate on September 3 read as follows:

> Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience.[30]

This version dropped the free exercise clause, while it made the establishment clause completely unambiguous on the permissibility of nondiscriminatory aid. It was defeated at first, but then was accepted by the Senate after reconsideration. But that did not end the matter. After the Senate rejected a motion offered on that same day to eliminate the religion amendment entirely, it then rejected two versions of the amendment that were similar to the one they had just accepted. The two defeated amendments read:

> Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.[31]

> Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibit-

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[29]1 *Annals* 779. For receipt by the Senate, see Journal of the First Session of the Senate, p. 60 (August 25, 1789). [Hereinafter cited as 1 S. Jour.]

[30]Ibid., p. 70.

[31]Ibid.

ing the free exercise thereof, nor shall the rights of conscience be infringed.[32]

The parliamentary status of the version that had passed earlier in the day is left mysterious by the *Journal*. But whatever its status, the succession of amendments offered makes it clear that both the wording of the establishment clause and the very presence of the free exercise clause were being debated. The Senate ended the day by accepting most of the Ames version, after striking the seemingly redundant clause, "nor shall the equal rights of conscience be infringed." At the end of September 3, the Senate version of the amendment read:

> Congress shall make no law establishing religion, or prohibiting the free exercise thereof.[33]

This did not satisfy some senators, who wanted to spell out the particular relationships between government and religion that they considered to be establishments. On September 9, the Senate embodied these concerns in the narrowest version of the amendment we have seen so far:

> Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.[34]

This was the religion amendment that the Senate sent back to the House.

The Meaning of the Final Language

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference.[35] The *Annals* do not give the House's reasons for rejecting the Senate's version of the religion amendment, but reasons come to mind readily. Madison's understanding of the kinds of governmental activities that should be prohibited was much broader than the understanding implied by the Senate amendment. At least part of Madison's broader conception was accepted by most members of the House.

The conference committee for the Bill of Rights was a strong one, composed of Representatives James Madison (Va.), Roger Sherman (Conn.), and John Vining (Del.), chairman of the House's Select Com-

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[32]Ibid.

[33]Ibid.

[34]Ibid., p. 77 (September 9, 1789). The Senate defeated the amendment that would have prohibited the states from infringing on the rights of conscience. Ibid., p. 72 (September 7, 1789).

[35]Ibid., pp. 77-78.

mittee, and Senators Oliver Ellsworth (Conn.), Charles Carroll (Md.), and William Paterson (N.J.).[36] The House members seem to have had their way on the religion amendment. The version that came out of the conference was essentially the Ames version with one significant alteration:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The conference committee's language was accepted by the House on September 24,[37] and by the Senate on September 25.[38]

The final wording of the amendment embodied key compromises on both the nation/state and the aid/no aid issues, compromises which were made possible by the more important underlying agreement on the need to pass a bill of rights before time pressures made passage that year impossible. The most important compromise on the aid/no aid issue involved the use of the word "establishment" without such qualifying phrases as "religious doctrine" or "articles of faith." This formulation satisfied Madison's desire to prohibit indirect forms of discriminatory religious assistance as well as the direct establishment of a national church. At the same time, the phrase "an establishment" seems to ensure the legality of nondiscriminatory religious aid. Had the framers prohibited "*the* establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.

Thus, through the choice of "an" over "the," the conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which the Congress reenacted in 1789. One key clause in the Ordinance explained why Congress chose to set aside some of the federal lands in the territory for schools: "Religion, morality, and knowledge," the clause read, "being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged."[39] This clause clearly implies that schools, which were to be built on federal lands with federal assistance, were expected to promote

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[36]Stokes, *Church and State*, vol. 1, pp. 546-47.
[37]1 *Annals* 913 (September 24, 1789).
[38]1 S. Jour. 88 (September 25, 1789).
[39]1 Stat. 50, 52 (1789), Art. III.

religion as well as morality. In fact, most schools at this time were church-run sectarian schools.

The conference committee's language indicates that, in addition to the problem of nondiscriminatory aid, committee members also were deeply concerned about the nation/state issue. This concern seems to have been reflected in the specific language they choose to insert, "no law *respecting* an establishment of religion."

Most commentators assume that the word "respecting" is synonymous with "tending toward." Thus, they read the clause as if it prohibits Congress from passing any law that tends to establish a religion. These commentators are only partly right. If this were all the conferees cared about, they could have handled the matter much more directly than they did. But what the conferees—or at least the House conferees—needed was language that would serve two purposes at once. To be sure, they wanted to prohibit laws that tended to establish a religion. But they also wanted language that would satisfy the nation/state concerns of such people as Elbridge Gerry and Samuel Livermore.

The language the conferees chose does serve both parts of this dual purpose. It not only prohibits laws which "tend to" establish a religion; it also prohibits Congress from passing laws "with respect to" an establishment of religion. In other words, it prohibits Congress from passing any law that would affect the religious establishments in the states.[40] This was designed to satisfy people from states, such as Massachusetts, that did have established churches. The conference committee's version did not go as far on this point as the proposal offered in the House by Livermore and Gerry on August 15, and that may help to explain why both men finally voted against the amendment when it was accepted by the House on September 24 by a vote of 35-14.[41] But the conference version was a compromise between the Ames version of August 20 and the more anti-Federalist Livermore version. Since the Ames version originally represented a compromise between the more nationalist Madison version and the Livermore proposal, the final version apparently went more than halfway in a vain effort to win the support of the anti-Federalists.

Most scholars who have written on the establishment clause fail to see this dual purpose because they underestimate the importance of the nation/state issue for the members of the First Congress. But, according to the only comprehensive study of that Congress written by a historian who used the First Congress Project's materials, federalism

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[40]Lowenthal noted the dual purpose of this language in "The Place of Religion," p. 19.

[41]1 *Annals* 913 (September 24, 1789).

was *the* overriding issue throughout the Congress.[42] There should be no surprise, therefore, about its importance here.

Thus, the records available to us demonstrate that the establishment clause was meant to have two major purposes:

(1) It prohibited the federal government from giving any aid to religion if the aid in question could *tend to* establish a religion. This prohibition was broader than either Gerry's "no religious doctrine" or the Senate's "no religious sect or society" formulas, but it was not so broad as to forbid such forms of nondiscriminatory assistance to religion as were found in the Northwest Ordinance.

(2) At the same time, the clause prohibited Congress from tampering with the state religious establishments. This prohibition was not so broad as it would have been under Livermore's proposal but it represented a more explicit guarantee to the states than anything in Madison's original package of amendments.

There remains one more difficult problem of interpretation. The legislative history of the establishment clause shows that the framers accepted nondiscriminatory aid to religion. Yet many writers, knowing Madison wanted to prohibit even this much, have used Madison's views stated elsewhere to support a strict separationist position. If these other writers are correct about Madison (and we know he did oppose Virginia tax benefits distributed to all churches), what can explain his willingness to go along with something different in the First Congress? The answer is twofold.

(1) He needed the votes to defeat Gerry's attempts during the summer of 1789 to delay the Bill of Rights, and he needed the Bill of Rights to achieve what was to him a more important goal than the exact wording of the establishment clause—public support for the new Constitution.

(2) Madison felt all along the First Amendment was unnecessary. He thought a modern extended republic would breed such a multiplicity of sects as to make establishment unlikely even without an amendment. Once amendment became politically desirable, he was willing to accept nondiscriminatory aid instead of strict separation. But the aid would be circumscribed very narrowly. It had to be given in pursuit of a legislative end specified in the Constitution, and it could not discriminate among sects. Together, these requirements would produce practical results only slightly different from the ones that would flow from his preferred notion of separation. All that would be needed was a strict enforcement of nondiscrimination. Even in Madison's day, nondiscrimination would have required one to consider Jefferson's margi-

[42]Kenneth R. Bowling, *Politics in the First Congress, 1789-1791* (University of Wisconsin: Ph.D. diss., 1968).

nally Christian deism as a religion. Today, we also would have to include Muslims, Buddhists, and other sects outside the Judaeo-Christian tradition. Thus, the compromise he agreed to would have permitted aid to private schools but not any of the practices he thought dangerous.

What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. All of them also thought religion was useful, perhaps even necessary, for teaching morality. They all thought a free republic needed citizens who had a moral education. They all thought the primary responsibility for this education lay with the states. And they all agreed that Article I gave Congress no direct power to to deal with the subject. The disagreement was over what Congress should be allowed to do pursuant to some other delegated power. Sylvester and those who agreed with him feared that religion would be hurt if Congress were not allowed to prefer religion over irreligion in otherwise valid laws. Madison, in forums outside the First Congress, thought religion would flourish best if it were left alone, in a strict policy of separation. But he saw no harm in compromising with Sylvester, so he did.[43]

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[43]These strands have been overlooked in the current debate over establishment for reasons largely having to do with the federalism issue. Some current writers believe the Civil War and Fourteenth Amendment so transformed the nation/state issue as to make readings based on 1789 desires to accommodate the anti-Federalists irrelevant. There are two answers to this.

(1) Before one assumes that the Fourteenth Amendment prohibits any state aid to religious organizations, one should be aware that the generation that adopted it thought yet another amendment (the "Blaine Amendment") would have been needed to achieve this. The amendment was passed by the House on August 4, 1876, but fell short of the necessary two-thirds in the Senate. The version introduced in the Senate on August 14, 1876 said, in part: "No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. . . . No . . . appropriation or loan of credit shall be made to any religious or anti-religious sect. . . . This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair the rights of property already vested." C. Moehlman, *The American Constitutions and Religion, Religious References in the Charters of the Thirteen Colonies and the Constitutions of the Forty-Eight States: A Sourcebook on Church and State in the United States* (Berne, Ind., 1938), p. 17.

(2) More important, suppose one adopts the post-1937 notion (in Palko v. Connecticut 302 U.S. 319, 58 S. Ct. 149, 82 L.ed. 288) that the concept of "ordered liberty" in the due process clause now requires the states to adhere to the establishment clause? Even so, one should not ignore the federalism portion of the original establishment clause, as the *Everson* Court did in 1947. Ignoring it affects the way one looks on the controversy over nondiscriminatory aid. If one tries to read the language in the establishment clause without its federalism context, a "no-aid" reading comes almost naturally. Understanding the federalism background helps clarify why the framers used the strange wording they did in a clause meant to permit nondiscriminatory aid.

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The Free Exercise Clause

The meaning of the free exercise clause is still unclear. After reading the congressional debates, we can guess that its purpose may have had something to do with the relationship between conscientious belief and its expression, but we are not given enough material to be more precise than that. For this, we shall have to look at the contemporary historical record.

The Virginia Example

In recent decades, the Supreme Court has looked to the example of Virginia for an explanation of the meaning of religious freedom. Chief Justice Earl Warren's 1961 Opinion of the Court in *McGowan* v. *Maryland* was typical in this respect:

> This Court has considered the happenings surrounding the Virginia General Assembly's enactment of "An act for establishing religious freedom," . . . written by Thomas Jefferson and sponsored by James Madison, as best reflecting the long and intensive struggle for religious freedom in America, and as particularly relevant in the search for First Amendment meaning.[1]

It would be too simple, of course, to equate the proceedings leading to the Virginia Religious Freedom Act with those leading to the ratification of the First Amendment,[2] but these proceedings can be helpful in

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[1]McGowan v. Maryland, 366 U.S. 420, 437, 81 S. Ct. 1101, 6 L.ed.2d 393 (1961).

[2]Several authors are critical of the Court's heavy reliance on the Virginia example, particularly with respect to the establishment clause. See C. J. Antieau, A. T. Downey, and E. C. Roberts, *Freedom from Federal Establishment: Formation and History of the First Amendment Religion Clauses* (Milwaukee: Bruce, 1964); Paul Kauper, *Religion and the Constitution* (Baton Rouge: Louisiana State University Press, 1964), p. 49; Ernest Brown,

our attempt to understand the First Amendment. In contrast with the lack of debate on the free exercise in the First Congress, the 1785 Virginia religious freedom debate led the noted authority Anson Phelps Stokes to describe it as probably the most significant debate on the subject ever to have been held in any legislative body.[3] Furthermore, the Bill for Religious Freedom passed at the culmination of this debate was the most far-reaching piece of legislation ever passed on this subject up to the time of the First Congress.[4] No other state—indeed, no other country—went as far toward protecting religious freedom in law as did Virginia in 1785.

What this means for our purposes, as we attempt to understand the meaning of free exercise in 1789, is that—unless someone discovers historical evidence to the contrary—we are justified in making one important assumption as we try to interpret 1789 intentions with 1785 evidence. Whatever Fisher Ames's precise intent may have been when he introduced the idea of free exercise, we may assume that the principles the representatives had in mind as they accepted Ames's language were not likely to have been more liberal than those of the most liberal of the Virginia religious freedom advocates. The phrase "free exercise" first appeared in the religion proposals made by the Virginia ratifying convention to the First Congress, and there is no evidence to suggest that the members of the Virginia legislature who made this proposal wanted the federal Constitution to give any more protection to religious activities than they gave under their own state laws.

The 1776 Virginia Declaration of Rights

The 1785 religious freedom bill did not arise *in vacuo*, of course. It was the end result of a decade-long struggle which began in 1776. The Virginia Constitutional Convention of May 1776 wrote a revolutionary constitution for the newly independent Commonwealth of Virginia containing a Declaration of Rights with a clause on religious liberty.[5]

"*Quis Custodiet Ipsos Custodes?*—The School Prayer Cases," 1963 *The Supreme Court Review* I, 7-9. I am less concerned with the fact that the Court relied on Virginia history, however, than with its interpretation of that history's meaning.

[3]Stokes, *Church and State*, vol. 1, p. 366.

[4]Ibid., vol. 1, p. 334.

[5]Hamilton J. Eckenrode wrote: "The religious struggle in Virginia, has been misunderstood because generally it has been considered by itself. . . . The controversy had a wider relation than to religion alone; it was a side of the Revolution." *Separation of Church and State in Virginia* (Richmond, 1910), p. 91. In addition, as we shall see, the victory of the Jeffersonian principles of religious liberty was but one facet of the political victory of the thought of John Locke in the United States.

The author of the clause was George Mason, one of the more experienced of the politicians who helped guide the declaration through the convention and one of the most forceful spokesmen for religious liberty in Virginia at that time. As originally proposed by Mason, the clause declared,

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society, and that it is the mutual duty of all to practice Christian forbearance, love and charity toward each other.[6]

Two points about Mason's proposal should be noted. First, the phrase, "the duty which we owe to our Creator, and the manner of discharging it" defined religion as the belief in a Creator and *all* of the duties arising from that belief. The definition was an important one, because it was the one consistently used in all of the Virginia legislation of this period. It excluded atheists, but it included deists. The second point is that, even though the definition considered all actions flowing from the duties owed to a Creator to be religious actions, the declaration did not say that all such actions could be performed freely. No person was permitted to do anything, whether religiously motivated or not, which might "disturb the peace, the happiness, or safety of society."

Mason's proposal went further than anything ever before adopted in Virginia, but it did not go far enough to satisfy James Madison—then a twenty-six-year-old political scientist not long out of his studies in religion at Princeton. Madison particularly objected to Mason's use of the word "toleration" to describe civil society's acceptance of religious freedom, because the idea of toleration implied something which existed as a gift from the government, and not as a matter of right. He offered a substitute clause which provided,

> That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence, or compulsion, *all men are entitled to the full and free exercise of it* according to the dictates of conscience; and therefore that no man or class of men ought on account of religion to be invested with particular emoluments or privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal

[6]G. Hunt, "Madison and Religious Liberty," *American Historical Association Annual Report* (1901), pp. 163, 166.

> liberty, and the existence of the State be manifestly endangered.[7]

Thus, Madison not only would have shifted away from the language of toleration to the language of rights, he also would have prohibited religious assessments and privileges, and, more important, he would have extended the protection of religious activity to include even those actions which disturb the "peace, happiness or safety" of society unless "the preservation of equal liberty and the existence of the State be *manifestly endangered*." This early version of the clear and present danger test went much further than Mason's proposal. The other delegates to the Virginia Convention would not accept it, however, and it was defeated, never to reappear in any proposal made in Virginia or elsewhere until the twentieth century.

The version finally adopted by the 1776 Convention contained Madison's "free exercise" language in place of Mason's phrase about toleration, and retained Mason's admonition to Christian forbearance, love, and charity. Neither Mason's nor Madison's version of the proper limit to place on legislative regulation of religious activity made its way into the final version: perhaps the legislature could not decide between the two texts. In its final form, then, the religious liberty guarantee of 1776 read as follows:

> That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.[8]

Between 1776 and 1784

The issue of religious freedom came up a number of times in the Virginia legislature in the eight years between the year the Declaration of Rights was adopted, 1776, and the year the fight leading to the Bill for Establishing Religious Freedom began, 1784. In December 1776, the Legislature's Committee on Religion, chaired by Jefferson, reported two bills designed to repeal all of the penalties then placed on dissenters for expressing their religious opinions. Both bills were passed. Also in 1776, the official tithes collected to meet the salary payments of Anglican clergy were suspended for one year. While Jefferson could

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[7]Ibid., pp. 166-67. [Emphasis added.]
[8]Ibid., p. 167.

not find enough support for a complete abolition of the tithe in 1776, the Revolutionary War made it easy to continue the one-year suspensions of support for the Church of England until the tithe could be abolished in 1779. Dissenting (that is, non-Anglican) ministers were given the right to perform marriages in 1780, as long as they obtained a license, and in 1784 the license requirement was eliminated.[9]

There seems to have been a temporary shift in direction by the end of 1784, as the supporters of establishment gained a majority in the Assembly. This was the result both of the war's end and of the sorry state of Episcopalianism since the end of the tithes.[10] The Act Incorporating the Episcopal Church was passed in December 1784. Far more important, however, was the General Assessment Bill of 1784, or the "Bill for Establishing Support for Teachers of the Christian Religion." This bill, designed to serve as a replacement for the tithe, would have (1) named Christianity as the Established Religion of the Commonwealth; (2) declared the Articles of Faith essential to Christianity; (3) defined the forms of congregation that constituted a Christian church; and (4) assessed each person a certain amount to be used to support the religious teacher and place of worship of his choice. If he should fail to name a choice, the amount was to be paid into a public fund to aid seminaries.[11]

General Assessment Bill of 1784

This General Assessment Bill passed its second reading in the Assembly by a vote of 44-42, on December 23, the day after the passage of the act incorporating the Episcopal church. Somehow, though, Madison was able to win a vote on the next day to postpone the third reading until the next session of the legislature, to be held at the end of 1785.[12]

By the time the legislature reconvened, the narrow majority in favor of assessment had been changed to a majority against. Several factors helped bring about this change. First, Patrick Henry was elected governor in November 1784, with Jeffersonian-Madisonian support. That was one month before the first votes on incorporation and as-

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[9]This material is summarized by Stokes, *Church and State*, vol. 1, p. 380 ff.

[10]Eckenrode, in *Separation*, pp. 73-75, noted that the Episcopal (Anglican) clergy had done so little to develop sources of voluntary contributions up to this time that, with the end of legally enforced tithes, a number of these clergy went without pay for years, while many others had to leave their churches. This and other factors led some supporters of the Revolution—including George Washington, John Marshall, and Patrick Henry—to express concern about the future ability of the churches to perform the function of inculcating morality in the citizens of the Commonwealth.

[11]An early version of this bill was published in Eckenrode, ibid., pp. 58-61.

[12]Ibid., pp. 102-103.

sessment, and it removed the leading supporter of assessment from the Assembly. Henry was easily the most powerful figure in the Assembly, and his departure, combined with the absence of anyone with equal legislative skills to take his place, left Madison in a position to take advantage of a vacuum. The effect of Henry's absence was already felt in the erosion of the support for assessment in the month between November and December, when Madison won postponement of the third reading. It became critically important by the following year.

The second major factor in the defeat of assessment was the tactical error made by its supporters of bringing up the question of incorporating the Episcopal church before the assessment issue was settled.[13] The passage of the Incorporation Bill helped persuade a number of Presbyterians to join the strong Baptist opposition to assessment. During the recess, Presbyterians began to see the justice of the argument made by Madison and his supporters that the principle used to support a general assessment for all Christian sects could just as easily be used to support a special assessment for the benefit of one sect only. The Incorporation Bill, giving legally privileged status to the newly formed Episcopal church, led many Presbyterians to wonder whether the Episcopal church wanted to replace its forebear, the Anglican church, as *the* established church of the Commonwealth.[14] As a result, they formally came out in opposition to the bill during the summer of 1785, thus reversing their previous position.[15]

The final factor connected with the defeat of assessment was Madison's famous Memorial and Remonstrance of July 1785. The Memorial and Remonstrance was used as the basis for hundreds of petitions bearing thousands of names that were sent to the legislature in the fall. The petition campaign, organized by Madison's allies in the legislature, shook the belief of many statesmen that the general public favored assessment. Indeed, it gave the impression—valid or not—of overwhelming public opposition to the bill.[16]

When the Assembly reconvened in October 1785, the General Assessment Bill was permitted to die quietly in committee.[17] In its place, the Assembly passed the Bill for Establishing Religious Freedom on December 17.[18] (Jefferson had written this bill in 1779 while he was

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[13]Ibid., pp. 100-101.

[14]Ibid., pp. 80-81.

[15]Ibid., p. 106.

[16]For Madison's opinion of the tactical importance of the Memorial and Remonstrance, see J. Madison, "Detached Memoranda," *William and Mary Quarterly*, 3d Series, vol. 3 (1946), pp. 534, 555-56.

[17]Eckenrode, *Separation*, p. 113.

[18]Ibid., p. 114.

chairman of the Religion Committee, but it had remained dormant until Madison revived it while serving on that same committee in 1785.) The 1784 Act Incorporating the Episcopal Church was repealed the following year.[19]

Madison on Religious Freedom

The opinions expressed by Madison in the Memorial and Remonstrance and by Jefferson in the Bill for Establishing Religious Freedom were, for our purposes, the most important of the views expressed during the ten years of Virginia debate. These two Virginia leaders were stronger advocates of the right of religious liberty than were any other major political leaders in the United States of the 1780s. As a result, what was said earlier about the way to use the example of Virginia in general applies with even more force to the historical relevance of Madison and Jefferson; whatever the general opinion on free exercise might have been in 1789 in the First Congress, the consensus surely did not go further than Jefferson or Madison would have gone in tolerating religious freedom.

Madison's views on religion during these years were stated most clearly in the Memorial and Remonstrance itself, and in the notes of a speech he made in the Assembly against the General Assessment Bill. In one of the important sections of this speech, Madison criticized the attempt of the General Assessment Bill to establish Christianity.[20] The principal objection was that the attempt to establish Christianity necessarily required someone to distinguish between what is Christian and what is not. The great danger in this was that, since definitions in this area are necessarily imprecise,[21] we may end up by branding those we call non-Christians as heretics. Once this happens the so-called heretics would have good reason to fear for their religious liberty.

Madison made a similar point in the Memorial and Remonstrance.[22] That work began with some general observations about religious liberty:

> We remonstrate against the said Bill, . . . because we hold it for a fundamental and undeniable truth, "that Religion or the

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[19]Ibid., pp. 116-29.

[20]James Madison, *Writings*, Hunt, ed., "Notes of Speech Against Assessments For Support of Religion," vol. 2 (November 1784), p. 89.

[21]In the long letter he wrote to Jefferson in 1787 describing the work of the Constitutional Convention, Madison commented that while "no distinction seems to be more obvious than that between spiritual and temporal matters," these lines become blurred upon closer inspection. October 24, 1787. ibid., vol. 5, p. 26.

[22]Ibid., vol. 2, p. 187.

> duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." [Quoted from the 1776 Declaration of Rights.] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to *exercise* it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the *opinions* of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such *homage*, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.[23]

Several points should be noticed about this passage. First, Madison accepted the definition of religion from the 1776 Declaration of Rights and, consequently, limited the discussion of religious liberty to a discussion of the claims against civil society which could be made by those who believe in the existence of a Creator. We noted earlier the dispute between Mason and Madison in 1776 over the extent to which civil society could legitimately regulate religiously motivated overt activity. The Memorial tried to split the difference between the two 1776 points of view. It began, as did Mason, with the statement of the primacy of opinion, but it went further. Madison argued that the natural right to hold opinions about the Creator implies a natural right to act on, or to exercise, those opinions. Madison did not go as far as he did in 1776, however, when he said that all action should be permitted unless it "manifestly endangered" the political community. In the Memorial, he seemed to limit the claims a believer could make against civil society to the performance of one particular kind of duty—the duty of paying homage to the Creator, that is, the duty of worship.

This view of the relationship between civil and religious obligation may seem straightforward at first glance, but it carried with it a number of difficult problems of interpretation. If worship is to be given some kind of special protection against legislative interference, it is necessary at some point to define the idea of "worship" and to state clearly the kind of protection it merits. Madison defined the idea in the quoted passage as the payment of homage to the Creator in a manner *the believer* thinks the Creator would find acceptable. In one respect, the subjective element of the definition is essential: Who but the believer himself is qualified to state the kind of worship demanded by the God

[23]Ibid., pp. 184-85. [Emphasis added.]

in whom he believes? In another way, however, this element was precisely what created the difficulties: no political community can recognize a natural right to worship as one pleases, if worship is defined as whatever the believer thinks may be essential to pay homage to God. It is clear, for example, that sacrificial murder cannot be tolerated in the name of worship.

Madison at no point indicated a way to resolve this problem. He apparently no longer thought that *all* forms of religious activity should be given special protection, but he indicated no satisfactory way of distinguishing worship from other forms of activity. In part, this imprecision may have stemmed from the fact that the Memorial was designed as a rhetorical argument against assessment, not one in favor of religious freedom. Unfortunately, because of a scarcity of sources, the speech against assessment and the Memorial are the best indications of Madison's thoughts on free exercise during this period. His views on establishment and on freedom of religious opinion are clear and well documented, but we are left in deep confusion on the meaning of the protection for religious activity.

Madison and Jefferson Compared

Jefferson's conception of religious freedom seems to have been more fully worked out than Madison's on this point and is more fully documented in readily accessible source material. Jefferson's Bill for Establishing Religious Freedom, for example, was much more explicit than the Memorial and Remonstrance in describing the kinds of religiously motivated behavior *not* protected by the idea of religious liberty. (In the quotation from the bill appearing below, the material in parentheses was in the bill as it was written by Jefferson in 1779 but was omitted from the version finally passed by the Assembly in 1785.)

> Well aware (that the opinions of men depend not on their own will, but follow involuntarily the evidence proposed to their minds;) that Almighty God hath created the mind free, . . . (that the opinions of men are not the object of civil government, nor under its jurisdiction;) that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles, on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty . . .; *that it is time enough for the rightful purpose of civil government for its officers to interfere when principles break out into overt acts against peace and good order*. . . .
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> We, the General Assembly, do enact, That no man shall be compelled to frequent or support any religious worship,

> place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by agreement maintain, their *opinion* in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[24]

This bill written by Jefferson and accepted by the Virginia General Assembly gave no protection to people who acted from religious motives if their actions, *in the judgment of government officials,* worked against peace and good order. Unlike Madison's Memorial and Remonstrance, the bill gave no explicit protection to worship except insofar as it was the expression of religious opinion. Under this formula, all sacramental activities were open to official scrutiny to see if they were consistent with peace and good order, and—again unlike the Memorial—the bill gave no weight to a religious interpretation of an action against an official interpretation of what the public order might require. Thus, Jefferson's formulation eliminated the ambiguity which resulted from Madison's attempt to protect worship while maintaining silence about other actions done in the name of religion.

This is about all we can learn from the 1785 bill itself. The bill differed from the Memorial and Remonstrance in important ways, but whether the differences between the views of their authors were seen by them as being serious ones is difficult to determine. Madison, after all, was the floor captain of Jefferson's bill in the Assembly. (Jefferson was in Paris.) Madison supported the bill's principles and was delighted by its success, but he probably would have wanted more had he had his first choice. The Memorial and Remonstrance represented a considerable step back from the "manifest danger" position of Madison in 1776. Nevertheless, the desire in 1784 to protect worship, as worship was defined by the Believer, suggested that some of the premises underlying his thought might have differed from premises accepted by Mason, Jefferson, and most of the other supporters of religious freedom in Virginia at that time.

Whether Madison supported Jefferson's views fully or only partially, it is quite clear that the position adopted by the Virginia General Assembly in 1785 was Jefferson's. As a result, if we want to understand the meaning and purpose of the 1785 Virginia Bill on the critical question of the protection of religiously motivated behavior, we must turn primarily to the writings of Jefferson, not Madison. And if we

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[24]T. Jefferson, *The Complete Jefferson*, Saul Padover, ed. (New York: Duell, Sloan & Pierce, 1943), pp. 946-47; Stokes, *Church and State*, vol. 1, pp. 392-94. [Emphasis added.]

want to understand Jefferson's thought, the best way to do so is to compare and contrast it with the thought of the writer who most directly influenced Jefferson's views on religious freedom, John Locke.

Jefferson and Locke

Much has been written about Locke's influence on Jefferson. The Declaration of Independence, for example, is well known to be based on the principles of Locke's *Second Treatise*. An article by S. Gerald Sandler[25] has proved beyond doubt that there was a similar connection between the Bill for Establishing Religious Freedom and Locke's *Letter Concerning Toleration*. Sandler arranged parallel passages from Locke's *Letter*, Jefferson's "Notes on Locke" (notes on the *Letter* compiled about 1775), and the Bill for Establishing Religious Freedom. These parallel passages, Sandler argued, show that Jefferson took material directly from Locke, transforming it into the ideas presented in the bill. Sandler found parallel passages in Locke and Jefferson's "Notes" dealing with at least these four of the principal lines of thought developed in the bill:

(1) True belief is inspired by reason, not force.

(2) Civil magistrates are not competent to judge matters of religious truth.

(3) The domains of church and state are separate, and, therefore, a citizen's (religious) opinions should have no effect on his civil capacities.

(4) Civil governments may punish sedition and other similar activities which represent the movement from opinion to overt activity against peace and good order.

Sandler's major point is incontrovertible: there were a number of key similarities between Locke's and Jefferson's thought. But there were important differences between them as well, and these are important to our understanding of what it was that the people of Virginia accepted. In order to explain both the similarities and the differences, therefore, as well as to provide a theoretical introduction for the presentation of Jefferson's thought, let us now look briefly at the *Letter Concerning Toleration*.

Locke on Toleration

Locke's *Letter* began by distinguishing between the proper business of civil government and religion.[26] The commonwealth, according to

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[25]S. Gerald Sandler, "Lockean Ideas in Jefferson's Bill for Establishing Religious Freedom," *Journal of the History of Ideas*, vol. 21 (1960), pp. 110-116.

[26]John Locke, *A Letter Concerning Toleration*, 2d ed. (New York and Indianapolis: Bobbs Merrill—Liberal Arts Press, 1955), pp. 17-23.

Locke, is a society of men who gather together to further their civil interests. These interests include "life, liberty, health and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like."[27] The duty of the civil magistrate is to secure these things for the people whom he serves; his jurisdiction cannot legitimately be extended to include the salvation of souls, because the purpose of politics is wholly concerned with the bodily needs—or "civil interests"—just described. A church, by way of contrast, is a free society whose major purpose involves the worship of God and the salvation of souls. Like the commonwealth, the church is a form of society, and as such it requires laws. But just as the commonwealth has no business making laws for the church, or legislating on the subject of salvation, neither should ecclesiastical discipline extend outside its own proper sphere. Thus, church law should not be concerned with civil and worldly goods, even if the church thinks there is a direct connection between worldly goods and eternal salvation. Similarly, the church should not use physical power to enforce its views on salvation; the use of physical power should be limited to the civil magistrate.[28] This "separation of church and state," based on a radical narrowing of the functions of both religion and politics, makes coexistence of church and state possible, but it is important to understand that this coexistence occurs largely on the state's terms: it is based on the view that the church should never interfere with the business of politics by compelling church members to accept the church's understanding of what is right and wrong with respect to the things of this world.

In return for telling the church to stay away from the business of the magistrate, Locke then told the magistrate not to interfere with what is left of the church's role. Since the function of politics leaves the magistrate with no legitimate reason for concerning himself with the salvation of souls, the magistrate therefore should not interfere with rites of worship—at least, not in the normal course of things. Locke avoided the difficulties Madison later faced with the idea of worship, however, by permitting the magistrate to prohibit from worship services whatever is normally prohibited to everybody. Thus, for example, ritual human sacrifice may be prohibited because all murder of humans is prohibited. On the other hand, the ritual sacrifice of calves must be permitted, as long as the animal slaughter corresponds to general health regulations concerning slaughter. The critical points here about the regulation of religiously motivated behavior are two:

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[27]Ibid., p. 17.

[28]Ibid., pp. 20-23.

(1) No magistrate may prohibit any activity merely because of an animosity toward the religious opinion reflected by that action. Actions must be judged in terms of their effect as actions, not in terms of the symbolic importance placed on them either by the believer or by the nonbelieving observers.

(2) This guaranty of nondiscrimination retained all important judgments in the hands of the civil magistrate. The magistrate could not discriminate against an action simply because it was motivated by a disliked religious opinion, but it was up to the civil authorities alone to judge the harmfulness or harmlessness of any particular activity.

What should a religious believer do, however, if the magistrate's judgment conflicts with his sense of religious obligation? What if, for example, the magistrate thinks that public health requires all butchering to be done in specified slaughterhouses, while the believer's religion requires him to sacrifice calves on an altar in his own house of worship? Or, what if the magistrate goes so far as to require the performance of an activity religiously prohibited, such as accepting a vaccination, saluting the flag, or participating in war? According to Locke, the first duty of a person placed in such a position is to follow his own conscience and save his immortal soul, but as a member of civil society he also has an obligation to obey the magistrate. Locke's solution to this conflict was interesting:

> What if the magistrate should enjoin anything by his authority that appears unlawful to the conscience of a private person? . . . Such a private person is to abstain from the action that he judges unlawful, and he is to undergo the punishment which it is not unlawful for him to bear. For the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation.[29]

Thus, as long as the magistrate acts within his proper sphere of authority, the citizen with conscientious scruples should accept the punishment meted out to everyone for disobeying the law. It is important to note that the punishment is considered legitimate, since it does no harm to the natural rights of conscience. Perhaps even more important, as Locke indicated in a passage shortly after the one just quoted, was that the final judgment of the legitimacy of a magistrate's action was *not* left to the conscience of the troubled individual:

> What if the magistrate believes that he has a right to make such laws and that they are for the public good, and his subjects believe the contrary? Who shall be judge between them?

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[29]Ibid., p. 48.

> I answer, God alone. For there is no judge upon earth between the civil magistrate and the people.[30]

What did placing the final say in God's hands mean in political terms? It meant, quite simply, that the final determination on this earth was the magistrate's.

So far, this interpretation of Locke's *Letter* has concentrated on the conflicting obligations placed on a citizen's behavior by religion and politics. As such, the interpretation may have given the impression that Locke analyzed opinions in a radically different way from the way he analyzed overt actions. This impression is not accurate. According to Locke, even though the magistrate is not concerned with the state of human souls as such, some opinions are so intimately connected with behavior affecting life, liberty, and property that they do fall within the proper sphere of a magistrate's concern.

Locke divided all opinions, including religious ones, into two major categories in the *Letter*—speculative and practical. Speculative opinions were defined as those which terminated in the understanding, while practical ones were those which could influence will and behavior.[31] The magistrate should not concern himself with speculative opinions, Locke said, because these—by definition—have nothing to do with the business of the commonwealth. Practical opinions were another matter, however, since overt actions would affect life, liberty, or property. The magistrate may regulate obvious practical opinions about what is right and wrong in politics, since these clearly affect the goods of this world. In addition, Locke listed four kinds of religious opinion which normally might be considered speculative, but which have a sufficient influence on practical action to permit their regulation. These included: (1) opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society; (2) a belief that one's own sect may have special prerogatives; (3) a loyalty to a foreign prince (for example, the Pope); and (4) belief in atheism.

To summarize: Locke's *Letter* protected no opinion or action from the civil magistrate as a matter of right, if the opinion or action had an adverse effect on the proper concerns of civil society. As a matter of practicality, the magistrate must have discretion in determining what might have this kind of an adverse effect, and, as a result, a magistrate could, in theory, overstep his rightful authority. If he did, this was a matter for God to judge: on this earth, the final word short of rebellion

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[30]Ibid., p. 49.

[31]Ibid., p. 45.

in disputes between citizens and magistrates must lie with the magistrates.

Locke and Jefferson on Religious Opinions

This analysis of Locke's *Letter* suggests that there were important differences between Locke and Jefferson. Jefferson, unlike Locke, placed great stress on the distinction between opinions and actions. The difference between the two writers on this point may not be as great as appears at first glance, as we shall see, but the emphasis Jefferson places on the protection of opinion was important nonetheless.

We have already looked at Jefferson's treatment of opinions and actions in the Bill for Establishing Religious Freedom. He also distinguished between opinion and action in the famous 1802 letter he wrote to the Danbury Baptist Association while he was President of the United States. Although the letter was brief (almost the whole of it appears below) there are indications that he meant the letter to be given serious attention.[32] The letter's key paragraph reads:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, *that the legislative powers of government reach actions only, and not opinions*, I contemplate with sovereign reverence that act of the whole American people which declared that this legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, *convinced he has no natural rights in opposition to his social duty.*[33]

Jefferson's well-known "wall of separation between church and State" was a barrier delineating the different functions of religion and politics. These different functions lead civil society to be concerned with overt actions only, not with mere opinions. The distinction between actions

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[32]Jefferson gave a draft of the letter to Levi Lincoln, his attorney general, before sending it. See Leo Pfeffer, "The Case for Separation," in J. Cogley, ed., *Religion in America: Original Essays on Religion in a Free Society* (New York: Meridian, 1968), p. 74.

[33]T. Jefferson, "Letter to Messrs. Nehemiah Dodge, Ephraim Robbins and Stephen S. Nelson, A Committee of the Danbury Baptist Association in the State of Connecticut," January 1, 1802, in *Complete Jefferson*, pp. 518-19. [Emphasis added.]

and opinions seemed clear and absolute, just as it did in the Bill for Establishing Religious Freedom. When we look more closely, however, at Jefferson's statement in his *Notes on Virginia* of the Lockean foundation for this wall of separation, we can see that the distinction between belief and action must be more equivocal than it appeared to be in the Danbury Baptist letter. The distinction between action and opinion was not self-explanatory, as it turns out, and Jefferson's toleration of expressions of dissenting religious opinion rested upon a more basic principle, as can be seen in the passage quoted below:

> Our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we have never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, *or no God*. It neither picks my pocket nor breaks my leg. If it be said his testimony cannot be relied on in courts of justice, reject it then, and let the stigma be on him.[34]

The major points of similarity between the Jefferson of this passage and Locke—the idea of natural rights, and the conception that the legitimate sphere of government extends only to injurious activity—are similarities which should be obvious to the reader and do not require further comment. Two important points do require amplification, however; Jefferson's views on atheists, and the status of harmful opinions.

A direct comparison of Jefferson's and Locke's views on how civil society should treat atheists points out one of the differences between them very clearly. Locke, we saw, thought that the acceptance of atheism would so undermine the bonds of civil society that the mere utterance of disbelief should occasion punishment. Jefferson did not disagree with Locke as to the utility of religion, but he did not consider the mere public expression of disbelief injurious to anything the government might legitimately protect. Further, the attempt to suppress the expression of atheistic beliefs would create an atmosphere injurious to the development of the true religion, which Jefferson thought to be a form of unitarianism.[35]

It is important to note, however, that Jefferson's reasons for ex-

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[34]T. Jefferson, "Notes on Virginia, Query XVII: The different religions received into that state," *Complete Jefferson*, p. 675.

[35]For this point, as well as several others used in this section on Jefferson's view on atheism, see Jeffrey A. Burnam, *Religion and American Political Society: The Contemporary Supreme Court and the American Founding* (M.A. thesis, University of Chicago, 1964), pp. 62-69.

tending the religious freedom guaranty to atheists[36] did not differ in any fundamental way from Locke's reasons for denying tolerance to atheists. The principle they both applied was, simply, that opinions about religion should be tolerated by the civil magistrate if—and only if—the opinions did not harm interests the government was supposed to protect. Jefferson thought that no expression of opinion about the existence of God could harm anyone else's life, liberty, or property, and for this reason he included atheist opinion within the spectrum of opinion protected. Locke, on the other hand, did not go this far, because he saw the open, public proclamation of atheist opinion as an immediate threat to civil society.

While the expression of disbelief in the existence of God should be tolerated, according to Jefferson, there were some opinions, which, by their very expression, *can* pick a man's pocket or break his leg. The expression of these opinions could be punished because picking a pocket or breaking a leg are overt acts within the sphere of legitimate governmental concern. Furthermore, even though the mere expression of disbelief in the existence of a God may not pick pockets or break legs, other opinions stemming from religious belief could conceivably have these effects. What determines whether the expression of these kinds of religious opinions—roughly analogous to Locke's "practical opinions"—should be punished is whether the magistrate decides that their mere expression constitutes overt acts against peace and good order.

For example, Jefferson was always willing to let the state governments punish seditious speech, and, in fact, his own two drafts of the Virginia Declaration of Rights carefully distinguished between religious opinion, which was to be protected, and seditious preaching, which was not.[37] Furthermore, we also know that he thought it possible to distinguish between religious and political utterances made from

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[36]Ibid., p. 58. Burnam argued convincingly that Jefferson intended the Bill for Establishing Religious Freedom to protect atheist opinion. In his *Autobiography*, Jefferson wrote of the defeat of an amendment offered in the Assembly which would have limited the Religious Freedom Bill's protections to Christians. Jefferson stated that the defeat of the amendment meant that the Assembly accepted his intention to extend the protection to "Jews, Mohammedans, Hindoos and infidels." See *Complete Jefferson*, p. 1147. Burnam pointed out that Jefferson used the word "infidel" to cover a wide range of disbelief including, most significantly, the atheism of the French *philosophes*. For proof, he cited Jefferson's letter to John Adams of April 8, 1816 in *The Adams-Jefferson Letters*, Lester Cappon, ed., 2 vols. (Chapel Hill, N.C.: University of North Carolina Press, 1959), vol. 2, pp. 467-68.

[37]Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge, Mass.: The Belknap Press, 1963), pp. 43-44, citing *The Papers of Thomas Jefferson*, Julian P. Boyd, ed., 17 vols. (Princeton, N.J.: Princeton University Press, 1950–), vol. 1, pp. 344, 353.

the pulpit,[38] and that he applied the same method of analysis to sermons about politics as to speeches of any other kind. In other words, to summarize Jefferson's views on this matter, Jefferson did distinguish between belief and action in many of his writings, but the *expression* of belief was considered to be an overt action, to be judged by its effect on civil society.

Free Exercise in the Bill of Rights

How can we translate all this material about Virginia practice into an understanding of the First Amendment's free exercise clause? We may accept as facts that Virginia gave more protection to religious freedom than was afforded anywhere else in the United States at the time, and that Jefferson's thoughts were the deepest and best expression of—if not the source of—the consensus of opinion reached in Virginia in the 1780s. Therefore, we may conclude that whatever protection the free exercise clause might have meant to give to religion, it was not likely to have been greater than the protection Jefferson thought religion should be given. We already have seen, however, that Jefferson would have given no more protection to religion than to atheism: harmless opinions were tolerated, while harmful opinions and actions were not.

If this is a correct interpretation of the history surrounding the free exercise clause, it seems to lead to a paradoxical conclusion. The religious freedom guaranty might have been important in Virginia as a protection for people branded as heretics, but, given the Jeffersonian interpretation of its meaning, the free exercise clause seems to add little not already present elsewhere in the Constitution: the speech clause of the First Amendment seems to protect opinions fully, while part of the idea of limited government, summarized in the Ninth and Tenth Amendments, is that even overt actions should not be regulated without cause.

This paradox forces us to conclude either that the free exercise clause simply was redundant, given the speech clause, or that it was not. If it was redundant, the major purpose of the clause would have to be understood to be rhetorical—an emphasizing of the special importance and delicacy of religious opinion within the whole spectrum of opinion protected by the speech clause. If the clause added something, however, it becomes necessary to consider what it might have added.

Two possibilities come to mind. One is that the speech clause may

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[38] T. Jefferson, "No Politics In the Pulpit," (a letter written on March 3, 1815 to comment on the Rev. Alexander McCleod's book on the War of 1812), *Complete Jefferson*, pp. 953-54.

not have been understood as a protection for the expression of religious opinion. Alexander Meiklejohn argued forcefully that the primary function of the speech clause was to act as a protection for political speech.[39] If the authors of the First Amendment were concerned primarily with political speech, and if they therefore thought religious speech needed additional protection, then the main purpose of the free exercise clause might well have been to protect people who wanted to make religious speeches.

But that is a very modest definition of free exercise, and most people think it must mean something more; "exercise" they say, must have something to do with action. Now, it is quite clear that the clause was not intended to give the kind of broad, sweeping protection to religious activity that Madison envisioned in his "manifest danger" test of 1776. But could the clause at least have been intended to go part way toward protecting that special method of expressing opinion that is peculiar to religion, the worship service? The concern must have been for something more than religious assembly, since the First Amendment protects the right of assembly against federal interference just as it protects the right of speech. Madison had indicated in his 1784 Memorial and Remonstrance a desire to go beyond this to protect religious actions, but it is impossible from the historical record to know whether he persuaded any other members of Congress to enter this minefield of ambiguity with him.

One thing does emerge clearly from the record, however. At no time did anyone in Virginia other than Madison suggest that the overt activities of religious people should be judged by standards different from those used to judge the overt actions of irreligious people. Whatever a believer might think of the religious significance of a particular activity, it was the policy of Virginians to judge all actions, including those labeled by the believer as worship, by secular standards of harmfulness or harmlessness. There is no evidence to suggest that the First Congress adopted a different point of view.

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[39] A. Meiklejohn, *Political Freedom*, "Part I: Free Speech and its Relation to Self-Government" (New York: Harper, 1960), pp. 3-87.

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Conclusion

It should be obvious to any student of the Supreme Court who has read this far that the Court has come no closer to following the original meaning of free exercise than of establishment. Ever since the cases of *Braunfeld* v. *Brown*,[1] *Sherbert* v. *Verner*,[2] and *Wisconsin* v. *Yoder*,[3] the Court has ruled that the Constitution in some circumstances requires that people who do things for religious reasons be treated differently from people who do the same things for other reasons. (The Court in *Yoder*, for example, said that an Amish student who refused to obey compulsory high school education laws must be treated differently from those who object to compulsory education for nonreligious moral reasons.) The Court's misreading of history in these free exercise cases is almost the obverse of its establishment clause error in *Everson*.

The framers of the Constitution and Bill of Rights wanted to create a secular liberal democracy, one in which laws were passed for secular reasons, and in which people, whatever their religious opinions, were expected as citizens to obey the law. They did want to promote religion by encouraging legislatures to write exemptions for religious objectors to otherwise valid civil laws, but these exemptions were considered acts of legislative grace, not constitutional rights.[4] The desire to en-

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[1]366 U.S. 599, 81 S. Ct. 1144, 6 L.ed.2d 563 (1961).

[2]374 U.S. 398, 83 S. Ct. 1790, 10 L.ed.2d 965 (1963).

[3]406 U.S. 205, 92 S. Ct. 1526, 32 L.ed.2d 15 (1972).

[4]These considerations were most evident during the First Congress's debate over whether to include a clause exempting religious conscientious objectors from militia duty in the Second Amendment. The clause was defeated for two reasons: (1) Some members explicitly rejected the idea that religious exemptions should be treated as rights. Egbert Benson, of New York, for example, said on August 17 that "No man can claim this indulgence of right. It . . . ought to be left to the discretion of the Government," 1 *Annals* 750. (2) Elbridge Gerry, ever concerned about the relative power of the national and state governments, thought that granting a consitutional right of exemption might open a

courage religion also led them to accept nondiscriminatory aid to religion. This encouragement was given for secular reasons and not for religious ones—because it was thought that religion did some good for civil society. But encouragement could go too far. In other nations, when encouragement became establishment, civil war too often was the result.

The modern Supreme Court correctly perceives that the framers wanted to encourage religion. But the Court uses the free exercise clause to grant religion special favors that the framers never thought were required, while prohibiting the nondiscriminatory assistance the framers would have permitted. Similarly, members of the Court correctly perceive that our democracy is at its core a secular democracy. But the Court implements this perception through its reading of the establishment clause, while not permitting a religiously neutral application of civil laws under its reading of the free exercise clause.

It is doubtful that the Court can maintain a consistent free exercise standard if it continues on this path of trying to sort out claims worthy of special protection from claims not deserving it. But the alternative—no special protection for any religious claims—may not be satisfactory either, given the Court's present reading of the establishment clause. If laws are to be applied equally to all, legislatures should have some other means at their disposal for countering the basically hostile impact of modern secular life on religion. Unfortunately, the modern establishment clause and the Court's decisions on the definition of religion[5] make this difficult.

My objections, however, go beyond matters of internal consistency. I believe the Court's position is flawed in a more basic way. The Court has created religious rights where none existed, reopening the controversy that had been settled in the eighteenth century. The Court has permitted religious opinion to stand as judge of the civil realm, while preventing the civil realm from helping religion on civil society's terms. I believe that when the political implications of this for a modern secular democracy are understood, the original understanding will seem attractive as a rule for today, and not simply as a curio for antiquarians.

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wedge for a potentially tyrannical national government that wanted to undermine the states' ability to maintain a viable militia. Gerry thought healthy militias lessened the need for and therefore the threat from a federal standing army. See M. Malbin, "Conscription, the Constitution and the Framers: An Historical Analysis," 40 *Fordham L. Rev.* 805 (1972). The clause was adopted by the House, rejected by the Senate, and omitted from the Second Amendment by the conference committee.

[5]See, in addition to Yoder: U.S. v. Seeger, 380 U.S. 163, 85 S. Ct. 850, 13 L.ed.2d 733(1965); Welsh v. U.S., 398 U.S. 333, 90 S. Ct. 1792, 26 L.ed.2d 308 (1970).